

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC.
SECURITIES, DERIVATIVE & ERISA
LITIGATION

No. 2:08-md-1919 MJP

**JOINT SUBMISSION
REGARDING ANSWER TO
SECURITIES COMPLAINT**

[DLC-6/PLC-5]

IN RE WASHINGTON MUTUAL, INC.
SECURITIES LITIGATION

Lead Case No. C08-0387 MJP

This Document Relates to:
ALL ACTIONS

Noted for Consideration:
May 28, 2009

I. INTRODUCTORY STATEMENT

On May 15, 2009, the Court entered an order [Dkt. 277] granting in part and denying in part defendants' motions to dismiss plaintiffs' Consolidated Class Action Complaint [Dkt. 67] (the "Original Complaint"). The final paragraph of the Court's order provides:

Plaintiffs' amended complaint must be filed by Monday, June 15, 2009. Defendants must bring any motions challenging the amended complaint by Friday, July 17, 2009. Plaintiffs must file separate responses to any motions, not an omnibus response. The parties must meet the briefing schedule and page-limit standards set forth in Local Civil Rules 7(d) and 7(e).

Shortly after the Court's ruling, defendants' liaison counsel contacted plaintiffs' liaison counsel to discuss defendants' position that (i) defendants have no obligation to

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1 answer the Original Complaint pending re-pleading and (ii) those defendants who move to
2 dismiss on July 17, 2009, have no obligation to answer the Amended Complaint pending the
3 Court's disposition of their motions. Plaintiffs disagreed and contend that defendants must
4 file an answer to those portions of the Original Complaint that were not dismissed on May 15,
5 2009, and/or that defendants must file at least a "partial answer" to the forthcoming Amended
6 Complaint. Liaison counsel jointly contacted the Court on May 26, 2009, and were advised to
7 present the disagreement in the form of this joint submission.

8 II. PLAINTIFFS' STATEMENT

9 Lead Plaintiff respectfully submits that Defendants should be required to file Answers
10 to the Consolidated Class Action Complaint's Counts Four, Five, and Six under the Securities
11 Act of 1933 (the "Securities Act") with respect to the October 2007 offering within a
12 reasonable period of time, because the Court has sustained these Counts with respect to this
13 offering. Federal Rule of Civil Procedure 12(a)(4)(A) requires Defendants to answer the
14 claims that have been sustained. The sustained claims will not change materially, if at all, in
15 the Amended Complaint to be filed by Plaintiffs in accordance with the Court's Order on
16 Defendants' prior motions to dismiss. These claims are going to be fully litigated regardless
17 of whether Plaintiffs' other claims are ultimately sustained, and Rule 12 requires Defendants
18 to answer the sustained claims so that Plaintiffs and the Court may know which allegations in
19 these claims are admitted, which are denied, and what defenses are asserted to these claims.

20 Nor does answering these claims impose any undue burden on Defendants. Counts
21 Four, Five, and Six entail approximately 63 pages of the Consolidated Complaint (including
22 the sections pertaining to jurisdiction and venue, the parties, the background of the Securities
23 Act claims, the October 2007 offering, and Counts Four, Five, and Six).

24 Plaintiffs offered to negotiate a reasonable extension of time for Defendants to file
25 their Answers to the sustained claims beyond the deadline set by Rule 12(a)(4)(A), and
26 Plaintiffs remain willing to negotiate an extension or accept a deadline set by the Court.

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1 Plaintiffs also recognize that Defendants need not answer the claims that are to be
2 replead until after the Court decides the anticipated motions to dismiss those replead claims.

3 III. DEFENDANTS' STATEMENT

4 Nothing in the Federal Rules of Civil Procedure ("FRCP") requires defendants to file a
5 "partial answer" to either the Original Complaint or the Amended Complaint:

6 *First*, as to the Original Complaint, FRCP 12(a)(4) provides that the Court may set a
7 deadline for any responsive pleading following ruling on a motion to dismiss. Here, by
8 directing plaintiffs to file an amended complaint on June 15, 2009, and directing defendants to
9 respond by July 17, 2009, the Court has already set a date certain (*i.e.*, July 17, 2009) for
10 defendants to respond to the allegations against them. Plaintiffs' Amended Complaint will
11 supersede the Original Complaint in all respects, "the latter being treated thereafter as non-
12 existent." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) (quoting *Loux v.*
13 *Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)); *see* Wright & Miller, Federal Practice & Procedure §
14 1476 ("Once an amended pleading is interposed, the original pleading no longer performs any
15 function in the case and any subsequent motion made by an opposing party should be directed
16 at the amended pleading.") (collecting cases).

17 It would be wasteful and pointless for defendants to prepare and file a "partial answer"
18 to the Original Complaint before June 15, 2009, only to have the Original Complaint (as well
19 as the answers to the Original Complaint) rendered null and void on June 15, 2009. That is
20 especially true here, given that plaintiffs have reserved the right to edit any or all claims in
21 their forthcoming Amended Complaint. Requiring defendants to prepare and file a response
22 to allegations in the Original Complaint that may be superseded in their current form in the
23 Amended Complaint is neither required by the Federal Rules nor consistent with "the just,
24 speedy, and inexpensive determination of every action and proceeding." FRCP 1.

25 *Second*, as to the Amended Complaint, the Court has set July 17, 2009, as the deadline
26 for responses. On that date, each defendant will either (i) file an answer to the Amended
27

1 Complaint, or (ii) move to dismiss some or all of the claims pursuant to FRCP 12. In the
 2 latter instance, the moving defendant has no obligation to file an answer. *See* FRCP 12(a)(4)
 3 (“serving a motion under this rule alters [the time for serving a responsive pleading until] 10
 4 days after notice of the court’s [denial of the motion]”).

5 Plaintiffs, however, apparently contend that each moving defendant must file a
 6 separate “partial answer” to any claims in the Amended Complaint that are not the subject of
 7 that defendant’s FRCP 12 motion to dismiss. But nothing in the rules speaks of “partial
 8 answers,” *see* FRCP 7(a), and “the majority of courts have expressly held that even though a
 9 pending motion to dismiss may only address some of the claims alleged, the motion to
 10 dismiss tolls the time to time to respond to all claims.” *Pestube Systems, Inc. v. HomeTeam*
 11 *Pest Defense, LLC*, 2006 WL 1441014, at *7 (D. Ariz. 2006)) (collecting cases). *See also*
 12 *Rosa v. California Board of Accountancy*, 2005 WL 1899515, at *3 (E.D. Cal. 2005) (same);
 13 *Batdorf v. Trans Union*, 2000 WL 635455, at *5 (N.D. Cal. 2000) (same); *Gortat v. Capala*
 14 *Brothers, Inc.*, 2009 WL 1295509, at *12 (E.D.N.Y. 2009) (same); *Godlewski v. Affiliated*
 15 *Computer Services, Inc.*, 210 F.R.D. 571, 572 (E.D. Va. 2002) (same); *accord* Wright &
 16 Miller, Federal Practice & Procedure § 1346 (2009).

17 * * *

18 For these reasons, defendants respectfully request an order providing that: (i) no
 19 defendant is obligated to answer or otherwise respond to the partially dismissed and soon-to-
 20 be-superseded Original Complaint; (ii) all responses to plaintiffs’ forthcoming Amended
 21 Complaint—whether by answer or by motion under FRCP 12—are due July 17, 2009; and
 22 (iii) no defendant responding to the Amended Complaint by motion under FRCP 12 is
 23 obligated to file a “partial answer” to any claims pending disposition of that defendant’s
 24 motion to dismiss.

RESPECTFULLY SUBMITTED this 28th day of May, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record who receive CM/ECF notification, and that the remaining parties shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 28th day of May, 2009.

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